In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-335

DENNIS EUGENE PRYBA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial in the United States District Court for the District of Columbia, petitioner was convicted of having transported obscene material in interstate commerce, in violation of 18 U.S.C. 1462, and of having possessed obscene material with intent to distribute, in violation of 22 D.C. Code 2001(a)(1)(E). He received a suspended sentence of one to three years' imprisonment, was placed on probation for two years, and fined $1,000 on the first count and received a concurrent two-year probation term and fined another $1,000 on the second count. The court of appeals affirmed (Pet. App. 4a-39a).

The facts are fully set forth in the opinion of the court of appeals. Briefly, they show that a man identifying himself as Tom Moore appeared before a United Airlines freight clerk at San Francisco International

Airport and sought to ship a box to petitioner in Washington, D.C. The clerk, in accordance with the airline's normal shipping procedures, asked what the package contained, to which question Moore responded that he did not know. When the clerk explained to Moore that the airline had to know the contents of all packages received in order to determine whether the commodity was acceptable and safe for air transportation, Moore "sort of shied back away from the counter and walked around a little bit while I was trying to determine what he was shipping. And after, oh, probably a couple of minutes' time, he came up with the suggestion well, it was something personal" (Tr. 44). The clerk accepted the package but, after Moore left, he gave the box to his supervisor, who opened it and discovered thirty reels of color movie film which on examination proved to be movies depicting various acts of sexual intercourse (Tr. 55-56).

The F.B.I. was informed, and the United Airlines supervisor showed the films to investigating agents,who viewed some of them through a projector. The films were then repackaged and sent to their destination, the Potomac News Company in southeast Washington. Meanwhile, F.B.I. agents in Washington secured a warrant authorizing a search of the Company's premises. The box of films was seized during the subsequent search.

Petitioner contends that the warrantless search by the United Airlines' employee violated the Fourth Amendment. His argument is that that search was performed pursuant to Rule 24 of C.A.B. Tariff No. 96,[1] and as

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[1]Rule 24 of C.A.B. Tariff No. 96 provides:

> *Inspection of Shipments*—All Shipments are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection.

such did not constitute a private, nongovernmental search. As the court below held, however, in an opinion upon which we rely, the right of an airline to inspect prospective shipments exists independently of Rule 24 (Pet. App. 14a-17a; footnotes omitted):

> Where the search is made at the behest of or with the assistance of law enforcement officers, there must be probable cause, and in appropriate instances an authorizing warrant, if the search is to pass constitutional muster. But where the search is made on the carrier's own initiative for its own purposes, Fourth Amendment protections do not obtain for the reason that only the activities of individuals or nongovernmental entities are involved. So frequently and so emphatically have the courts enunciated and applied these principles that, at least for the time being, they must be regarded as settled law.
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> [T]he airline's inspection privilege exists independently of Rule 24. It is rooted in the rule of the common law that common carriers have the right to decline shipment of packages proffered in circumstances indicating contents of a suspicious, indeed of a possible dangerous, nature. Justification for the carrier's refusal is to be found in the exigencies of safeguarding life and property, and undeniably the frustration of criminality is likewise a worthy carrier endeavor. The imperatives of either objective may warrant inquiry by the carrier as to the contents of a parcel tendered for shipment; they may suffice, too, to justify a reasonable inspection of the parcel to fulfill that purpose. And the carrier's interest in ascertaining the character of suspicious parcels intensifies when, as here, the carrier conceiv-

ably could find itself faced with a criminal prosecution—albeit one perhaps ill-founded—for unlawfully transporting obscene matter.

In the case at bar, United Airlines unquestionably had an important interest in learning the contents of the box, which in the circumstances prevailing only an inspection could safeguard * * *.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[2]Moreover, even if the search by the airline employee were to be viewed as conducted pursuant to Rule 24, the authority of that Rule would not constitute sufficient governmental involvement in the procedure to permit imposition of the Fourth Amendment constraints upon a private carrier's employees. See *United States* v. *DeBerry*, 487 F. 2d 446, 449-450, n. 1:

> These tariffs, if valid, "are conclusive and exclusive, and the rights and liabilities between airlines and their passengers are governed thereby." *Tishman & Lipp, Inc.* v. *Delta Air Lines*, 413 F. 2d 1401, 1403 (2d Cir. 1969). The practical effect of this arrangement is that the person shipping goods consents to the inspection of his goods by entering into the contract of shipment. The Board's involvement in these inspections—and therefore the Government's —is limited to accepting the tariffs as filed and providing a forum for challenges to tariffs by either the Board or interested parties.